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NO. 83-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

RICHARD ALLEN NERISON,

Respondent,

CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK V. MEIERHENRY
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QUESTION PRESENTED

WHETHER A CIRCUIT COURT OF APPEALS VIOLATES THE RULE OF ROSE V. LUNDY, BY SUA SPONTE RAISING A NEW ISSUE AT THE FEDERAL APPELLATE LEVEL AND THEN RULING THAT THE NEW ISSUE IS UNEXHAUSTED WHILE, AT THE SAME TIME, ADDRESSING THE REMAINING ISSUES?

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OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

RICHARD ALLEN NERISON,

Respondent,

JURISDICTIONAL STATEMENT

On August 24, 1983, the Eighth Circuit Court of Appeals entered Judgment and filed an Opinion denying Petitioner Nerison's Petition for Writ of Habeas Corpus.

On November 21, 1983, Petitioner Nerison's Petition for Writ of Certiorari to

the United States Court of Appeals for the Eighth Circuit and Appendix in the case of Richard Allen Nerison v. Herman Solem, et al., was received by the South Dakota Attorney General's Office, the attorneys for the Respondents.

This Court's jurisdiction is invoked under rules of the Supreme Court No. 19.5.

STATEMENT OF THE CASE

On January 30, 1976, Richard Allen Nerison pled guilty to the crime of third degree burglary at arraignment before a South Dakota circuit judge. Nerison's plea was entered pursuant to a plea agreement in which the prosecuting attorney agreed to drop the original charge of first degree burglary if Nerison would plead guilty to third degree burglary. Nerison was sentenced to six (6) years in the State Penitentiary.

This judgment and six-year sentence were later vacated.

On December 17, 1976, Nerison was then recharged with first degree burglary. Nerison was convicted of first degree burglary by a trial jury and sentenced to fifteen (15) years in the State Penitentiary.

On July 18, 1979, Nerison requested and received a state post-conviction relief hearing. On January 18, 1980, Nerison's requested post-conviction relief was denied.

On July 29, 1980, Nerison filed with the United States District Court for the District of South Dakota, Southern Division, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In that application, Nerison claimed the following six grounds for relief:

1. Did the trial court abuse its discretion in refusing Petitioner's request for a change of judge?

2. Did the trial court abuse its discretion in refusing to permit Petitioner a continuance for the reason that Petitioner's attorney was

requested to prepare Petitioner's case only two days prior to trial?

3. Did the trial court abuse its discretion in denying Petitioner's request for appointment of substitute counsel?

4. Was the Petitioner denied effective assistance of counsel?

5. A. Did the Jury Instruction No. 11 violate Petitioner's right of due process?

   B. Did Jury Instruction No. 12 violate Petitioner's constitutional rights?

6. Was the trial court's refusal to give Petitioner's proposed jury instructions 2 through 4 constitutional error?

The jurisdiction of the District Court to hear the Petition for Writ of Habeas Corpus was invoked pursuant to 28 U.S.C. § 2254.

On February 24, 1982, the District Court rejected Nerison's arguments and on February 25, 1982, filed a Judgment of Dismissal.

On April 16, 1982, Nerison's Notice of Appeal of the above issues was filed with the Eighth Circuit Court of Appeals. The jurisdiction of the Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 2253.

On January 31, 1983, following submission of briefs by both parties, the Eighth Circuit Court of Appeals, on its own motion, ordered the parties to file supplemental briefs covering the new issue of "enhanced sentence." (Appendix at pp. 62-63).

The State's Supplemental Brief responded to the order by claiming that the Eighth Circuit Court of Appeals was not empowered to decide the new "enhanced sentence" issue because (1) a court of appeals may not consider facts or issues not presented to the district court, (2) Rose v. Lundy, denied jurisdiction by the Eighth Circuit Court of

Appeals, (3) Engle v. Isaac, denied jurisdiction by the Eighth Circuit Court of Appeals, (4) a Court of Appeals has no jurisdiction to grant an original writ of habeas corpus, and (5) the new "enhanced punishment" issue was not ripe for adjudication.

In its opinion filed on August 24, 1983, the Eighth Circuit Court of Appeals ruled on the new "enhanced punishment" issue in a footnote as follows:

> Nerison received a six year sentence after pleading guilty to third degree burglary; following his conviction for first degree burglary, he received a fifteen year term. He now argues that the imposition of a longer sentence after retrial for the same criminal transaction is unconstitutional in light of North Carolina v. Pearce, 395 U.S. 711 (1968). In Pearce, the Court set certain guidelines to be followed upon resentencing after a new trial. Nerison raises this claim for the first time on appeal. Because Nerison has not exhausted his state remedies, we have no jurisdiction to review this claim. (Appendix at p. 16).

Notwithstanding their own ruling that the new "enhanced punishment" issue was unexhausted, the Eighth Circuit opinion proceeded to rule on the merits of Nerison's other issues.

The August 24, 1983, opinion denied Nerison's requested relief.

On November 21, 1983, Nerison's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the case of Richard Allen Nerison v. Herman Solem, et al., was received by South Dakota Attorney General's Office, the attorneys for the Respondents.

This Cross-Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE CROSS-PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Rose v. Lundy, 455 U.S. 509, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), this Court held that if a federal district court is presented a petition for writ of habeas corpus containing both exhausted and unexhausted claims, the court must "dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

In this case, Nerison's habeas corpus petition to the federal district court contained only exhausted claims. It is also true that Nerison's appeal to the Eighth Circuit Court of Appeals originally contained only exhausted claims.

When, however, the Eighth Circuit ordered the parties to brief the new "enhanced punishment" issue, the parties complied, and the Eighth Circuit, in its opinion, held that

the new issue was unexhausted, Nerison's habeas corpus petition was transformed into a "mixed petition."

Therefore, the decision of the Eighth Circuit Court of Appeals to address Nerison's remaining issues was a violation of the total exhaustion requirement articulated in Rose.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Assuming, arguendo, that Rose v. Lundy is not dispositive of Nerison's appeal (for the Eighth Circuit, not Nerison, created the mixed petition), the State of South Dakota believes that the question whether a circuit court of appeals violates the rule of Rose v. Lundy by sua sponte raising a new issue at the appellate level and then ruling that the new issue is unexhausted while, at the same

time, addressing the remaining issues, is an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1483-SD September Term, 1982

Richard Allen Nerison,

Appellant,

vs.

Herman Solem, Warden, etc., et al,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties without oral argument.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is

hereby, affirmed in accordance with the opinion of this Court.

August 24, 1983

A True Copy:

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

9/21/83

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1483

Richard Allen Nerison, Appellant,	*	
v.	*	Appeal from the
Herman Solem, Warden, South Dakota State Penitentiary and Mark Meierhenry, Attorney General, State of South Dakota, Appellees.	* United States District Court for the District of South Dakota	

Submitted: August 18, 1983

Filed: August 24, 1983

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

Richard Allen Nerison filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in United States District

Court.[1] His petition was denied and he appeals to this court. For the reason set forth below, we affirm the judgment of the District court.

Nerison was charged with the first degree burglary of an occupied structure in Union County, South Dakota, on December 26, 1975. On January 30, 1976, pursuant to a plea bargain, Nerison pleaded guilty to the crime of third degree burglary and was sentenced to six years in the South Dakota Penitentiary by Circuit Judge Donald Erickson. The judgment and sentence were later vacated in post-conviction proceedings. Thereafter, Nerison was recharged with first degree burglary based on the same incident. Nerison went to trial on December 29, 1976, and a

---

[1] The Honorable John B. Jones, United States District for the District of South Dakota.

jury convicted him of first degree burglary on December 30. Judge Erickson presided over both trials.

Nerison petitioned the state trial court for post-conviction relief, which was denied after an evidentiary hearing. Nerison appealed the denial to the South Dakota Supreme Court. Having exhausted all state remedies, Nerison filed a federal habeas corpus petition, assigning the following errors in his state trial:

That his due process rights were violated when his request for change of judge was denied as untimely and the trial judge failed to recuse himself on his own motion.

That his rights to due process and effective assistance of counsel were denied by the court's refusal to substitute court appointed counsel.

That the trial judge deprived him of effective assistance of counsel by denying his motion for a continuance.

That two of the trial court's jury instructions violated his due process rights.

That the court's refusal to give three of his proposed instructions to the jury violated due process.

Discussion

A. Change of Judge

Nerison filed an affidavit of prejudice against Judge Erickson on December 17, 1976, two days before his trial date. The affidavit alleged that Judge Erickson had formed an opinion that Nerison was guilty of the offense charged because the judge had accepted his earlier plea and had become familiar with the facts of the case. Through this affidavit, Nerison requested that another judge be appointed. The presiding circuit judge denied the request because it was not timely made more than ten days prior to trial, as required by S.D. CODIFIED LAWS ANN. § 15-1227 (1967). Under Wainright v. Sykes, 433 U.S. 72 (1977), failure to comply with state procedure is an independent and adequate state

ground barring federal habeas corpus review, absent a showing of cause for and actual prejudice resulting from the waiver. This principle applies even where the error affects the truthfinding function of the state trial. Engle v. Isaac, 456 U.S. 107, 129 (1982).

Nerison cites Canon 3C(1)(a) of the South Dakota Code of Judicial Conduct, Appendix to Chapter 16-2 of the South Dakota Codified Laws:

> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

This section clearly refers to personal bias, as opposed to judicial bias. It is settled in this circuit that the bias necessary to disqualify a judge must "stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971)(quoting United States v. Grinnel Corp., 384 U.S. 563, 583 (1966)). A trial judge's mere familiarity with a party and his legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias. Id. at 1261. Nerison has not pointed to any instances of personal bias and his claim of judicial bias is factually unsubstantiated. Having shown no cause for his failure to make a timely request and no prejudice as a result, he has no grounds for habeas corpus relief.

B. Ineffective Assistance of Counsel

Nerison contends that his trial counsel failed to effectively represent him. The district court applied the Eighth Circuit standard of review for this claim, as set out in Dupree v. United States, 606 F.2d 829, 830-31 (8th Cir. 1979), cert. denied, 445 U.S. 919 (1980):

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844, 98 S.Ct. 145, 54 L.Ed.2d 109 (1977). There is a presumption that counsel has rendered effective assistance. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.), cert. denied, 429 U.S. 868, 97 S.Ct. 178, 50 L.Ed.2d 148 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

In regard to this contention, the court made the following factual determinations:

Counsel was familiar with the case before trial, having represented Nerison in prior post-conviction proceedings concerning the same incident;

Counsel consulted with his client a number of times after being formally appointed on December 3, and attended the December 13 hearing in an advisory capacity;

Counsel adequately prepared for trial and adequately conducted his client's defense. He demonstrated reasonable familiarity with the facts at trial, conducted both adequate direct and cross-examination, and secured the testimony of several witnesses, including one expert witness to support his client's defenses. In light of these circumstances, we find that Nerison has not overcome the presumption of adequate representation.

C. Denial of Continuance and Substitution of Counsel

At the preliminary hearing, Nerison informed the court that he did not want his court-appointed attorney to represent him.

The court amended its order to make counsel's assistace available at Nerison's request, and continued the preliminary hearing for one week to allow him to retain other counsel. Nerison failed to get another attorney, insisting that the court must appoint one to his satisfaction. On December 27, 1976, Nerison requested his court-appointed counsel to represent him at the trial scheduled to commence on December 29, 1976. On December 28, 1976, counsel telephoned the trial judge to request that the trial be postponed. Immediately preceding the trial and immediately after both sides had rested, counsel moved for dismissal based on the trial court's refusal to grant his client's request for a continuance. Both motions were denied.

A denial of a continuance will be reversible error only if there is a clear abuse of discretion. United States v. Sheehy, 670 F.2d 798, 799 (8th Cir. 1982). To determine

whether the trial court has abused its discretion, the reviewing court will consider factors including counsel's time for preparation, conduct of counsel at trial and presence of prejudice in the record. United States v. Campbell, 609 F.2d 922, 925 (8th Cir. 1979), cert. denied, 445 U.S. 918 (1980). The factual basis underlying both the crime charged and the available defenses was relatively simple. Furthermore, although Nerison did not fully accept counsel's representation until two days before trial, counsel was familiar with the case, having represented him in prior post-conviction and pretrial proceedings. No prejudice resulted from the trial court's denial, and if counsel was not completely prepared, Nerison contributed to the lack of preparation.

To warrant substitution of counsel, the defendant must show justifiable dissatisfaction with his appointed counsel. United

States v. Hart, 557 F.2d 162, 163 (8th Cir.), cert. denied, 434 U.S. 906 (1977). The right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice. Id. Substitution of counsel is a matter committed to the sound discretion of the trial court. In the context of this case, grounded either on ineffective assistance of counsel or abuse of discretion in denying a continuance, the critical issue is whether the appellant was materially prejudiced by the trial court's failure to grant a continuance to allow his counsel to further prepare the case. Nerison has made no showing of prejudice.

D. Jury Instructions

First, Nerison claims that the trial court erred by giving jury instructions 11 and 12. He argues that instruction 11 removed the element of specific intent from the

burglary charge, and that instruction 12 impermissibly shifted the burden of proof on the specific intent element from the state to him. South Dakota has a statutory contemporaneous objection rule, S.D. CODIFIED LAWS ANN. § 23A-24-2(5) (1979); we note that Nerison never objected to these instructions at trial. Failure to raise a timely objection is a procedural bar to habeas corpus review under Wainwright v. Sykes, 433 U.S. 72 (1977), and Nerison has shown no cause for his failure to object. Under these circumstances, Wainwright v. Sykes is dispositive. Cf. Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981).

Finally, Nerison contends that he was entitled to have the jury instructed on the lesser included offenses of grand larceny and petty larceny. At trial, Nerison proposed three larceny instructions, but the court rejected them and instructed the jury on

first, third and fourth degree burglary. Nerison now argues that he was entitled to the larceny instructions as a matter of due process.

> Claimed errors in instructions to the jury are generally not of such constitutional magnitude and do not state a claim for habeas corpus relief. * * * More particularly the courts have held that the trial court's failure to give a lesser included offense instruction is not normally such a constitutional error or "fundamental defect" as to allow collateral review under habeas corpus.

DeBerry v. Wolff, 513 F.2d 1336, 1338-39 (8th Cir. 1975)(citation omitted). It is significant that the jury was charged on the lesser offenses of third and fourth degree burglary, but returned a verdict of first degree burglary. Thus, the failure to give instructions on larceny, even if error, was harmless. Cooper v. Campbell, 597 F.2d 628, 631 (8th Cir.), cert. denied, 444 U.S. 852 (1979).

We have thoroughly reviewed the state court files and transcripts of proceedings, as well as the record in federal court, and we affirm the district court's denial of the writ.[2]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

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[2] Nerison received a six year sentence after pleading guilty to third degree burglary; following his conviction for first degree burglary, he received a fifteen year term. He now argues that the imposition of a longer sentence after retrial for the same criminal transaction is unconstitutional in light of North Carolina v. Pearce, 395 U.S. 711 (1968). In Pearce, the Court set certain guidelines to be followed upon resentencing after a new trial. Nerison raises this claim for the first time on appeal. Because Nerison has not exhausted his state remedies have no jurisdiction to review this claim.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

* *

RICHARD ALLEN NERISON,	*	CIV 80-4132
Petitioner,	*	
-vs-	*	MEMORANDUM OPINION
HERMAN SOLEM, Warden, South Dakota State Penitentiary; MARK V. MEIERHENRY, Attorney General, State of South Dakota,	*	
Respondents.	*	

* *

Richard Allen Nerison (Petitioner) petitioned this court for a Writ of Habeas Corpus, pursuant to 28 U.S.C. 2254, alleging that he is incarcerated in the South Dakota State Penitentiary in violation of the United States Constitution. Counsel for both Petitioner and Respondent stipulated that the

entire state court file be made a part of the record in this case, that no further evidence need be introduced, and that the issues be submitted on briefs.[1]

On January 30, 1976, pursuant to a plea bargain, Petitioner pled guilty to the crime of third degree burglary and was sentenced to six years in the South Dakota State Penitentiary by a state court judge. This guilty

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[1] Nerison is incarcerated for the first degree burglary of an occupied structure in Union County, South Dakota, on December 26, 1975. The petition, filed on July 29, 1980, was initially referred, by U. S. District Judge Fred J. Nichol, to former U. S. Magistrate William F. Clayton, who settled the record by Order dated November 10, 1980. It was thereafter transferred to the current U.S. Magistrate. This court agreed to take the petition under advisement in late January of 1982.

Although the Stipulation and Order settling the record in this case does not clearly refer to Mr. Nerison's state court post-conviction file, the court has considered both the criminal file, State v. Nerison, Cr. 76-1, and the post-conviction file, Nerison v. State, denominated Cr. 79-97.

plea and concomitant sentence were later vacated in post-conviction proceedings. Shortly thereafter, Petitioner was recharged with first degree burglary. Both charges stemmed from the same incident.

Following arraignment and appointment of counsel on December 3, 1976, and a preliminary hearing on December 13, 1976, petitioner was convicted of first degree burglary, by jury verdict, on December 30, 1976. The judge who had previously taken petitioner's guilty plea also presided at the trial and later sentenced petitioner to fifteen years in the State Penitentiary.

Post-conviction relief was denied by the state trial court, after an evidentiary hearing. A certificate of probable cause to appeal that decision was denied by both the trial court and the South Dakota Supreme Court. Respondent concedes in its answer

that petitioner has exhausted all available state remedies.

Petitioner raises the following issues:

(1) Were petitioner's due process rights violated when his request for change of judge was denied as untimely and when the trial judge failed to recuse himself on his own motion?

(2) Was petitioner denied due process and ineffective assistance of counsel when his repeated requests for substitute court-appointed counsel were denied?

(3) Was petitioner deprived of effective assistance of counsel and a fair trial when the trial judge denied his motion for a continuance shortly before the trial?

(4) Did two of the trial court's jury instructions and its refusal to give three of the petitioner's proposed instructions deprive petitioner of due process of law?

(5) Was petitioner's trial counsel constitutionally ineffective?

Petitioner's first three grounds concern alleged procedural errors committed by the state trial court. It is well established, however, that the function of federal courts in reviewing habeas corpus petitions is not to remedy state court procedural errors or to promulgate state rules of criminal procedure. Rather, a justiciable federal issue is present only where the state procedural or trial error infringes upon a specific constitutional protection or is so prejudicial as to amount to a denial of due process of law. Arnold v. Wyrick, 646 F.2d 1225 (8th Cir. 1981); See Schleicher v. Wyrick, 529 F.2d 906 (8th Cir. 1976).

CHANGE OF JUDGE

Having failed to timely file an affidavit of prejudice against the trial judge

under state procedural law, petitioner now claims that he was denied due process of law because of the judge's prejudice against him. The judge had previously accepted petitioner's guilty plea to the charge of third degree burglary, had established a factual basis for that plea, and had sentenced him to six years in the penitentiary for acts arising out of the same incident for which petitioner was subsequently sentenced to fifteen years. Petitioner contends that this sentencing disparity alone clearly demonstrates the prejudice of the trial judge. Alternatively he argues that, because the judge's impartiality might reasonably be questioned, a different judge should have been appointed even if he cannot show actual prejudice during the trial.

Petitioner's claims are without merit. All factual issues in this case were tried to a jury. Although a trial before an unbiased

judge is essential to due process, petitioner has not shown any specific manifestations of bias on the part of the trial court. Nor has he alleged any attempt by the trial court to influence the jury or its verdict. Notably, a different state judge, after holding a post-conviction hearing on this issue, found no evidence of bias or prejudice on the part of the trial judge. That finding is presumptively correct, 28 U.S.C. 2254(d), and has been confirmed by this Court's independent review of the record.

Furthermore, petitioner has neither claimed nor shown any personal bias on the part of the judge; rather, he simply alleges that the judge formed a prior opinion on petitioner's guilt or innocence through what he had learned about the case in previous judicial proceedings. Petitioner cites no authority establishing a violation of any due

process rights simply because of knowledge gained in pre-trial proceedings.

More importantly, however, petitioner's claim of judicial prejudice is factually unsubstantiated. The mere fact that the trial judge exercised his statutory discretion in sentencing petitioner to a longer prison term, after the facts surrounding the burglary were fully developed at trial and after petitioner had been convicted of a more serious felony by jury verdict, does not establish either prejudice on the part of the trial judge or prejudice to petitioner during his trial. Absent a showing of prejudice, petitioner's claim that the judge should have disqualified himself because "his impartiality might reasonably be questioned," has no constitutional significance. Compare Mendenhall v. Hopper, 453 F.Supp. 977, 983 (S.D. Ga. 1978).

Because of this disposition on the merits, the court does not address respondent's claim that review is barred under Wainwright v. Sykes, 433 U.S. 72 (1977), because petitioner failed to file a timely request for change of judge under S.D.C.L. 15-12-27.[2]

APPOINTMENT OF SUBSTITUTE COUNSEL

Petitioner alleges that because of a complete breakdown of communications with his

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[2] Petitioner's affidavit for change of judge was filed on December 23, 1976. The trial date had been previously set for December 29, 1976. Thus, petitioner had not complied with S.D.C.L. 15-12-27 which reads, in pertient [sic] part, as follows:

> [A]n affidavit for change of circuit judge. . . must be filed within the following times:
>
> . . .
>
> (b) In actions triable by a jury in the circuit court at least ten days prior to the date said action is scheduled for trial . . . .

appointed counsel, counsel's lack of trial preparation, petitioner's mistrust of counsel, and general animosity between the two, the trial court's refusal to appoint substitute counsel resulted in ineffective assistance of counsel and a denial of petitioner's due process rights. These claims are unsubstantiated and without merit.

A court is not constitutionally required to provide an indigent accused with appointed counsel of his own choosing. Therefore, in absence of good cause or a showing of "justifiable dissatisfaction" with appointed counsel by the petitioner, substitution of counsel is a matter committed to the sound discretion of the trial court. United States v. Hart, 557 F.2d 162 (8th Cir. 1977), cert. denied 434 U.S. 906 (1977); United States v. Young, 482 F.2d 993 (5th Cir. 1973); State v. Erickson, 129 N.W.2d 712 (S.D. 1964).

By the same token a complete breakdown in communications or an irreconcilable conflict that leads to an apparently unjust verdict, or some other "justifiable dissatisfaction" may be sufficient to deprive an accused of effective assistance of counsel. See Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970); U.S. v. Hart, supra; U.S. v. Young, supra.

Petitioner's reliance on Brown v. Craven is misplaced. The record here indicates that any conflict between petitioner and his court-appointed attorney was neither irreconcilable nor so great that it resulted in a "total lack of communication" between the accused and his appointed attorney. The two conferred a number of times prior to trial. Counsel also advised petitioner on filing an affidavit of prejudice against the trial judge, and later, at petitioner's request, prepared and submitted such an affidavit.

Petitioner ultimately requested that counsel defend him at trial. The trial testimony of petitioner and the various witnesses who presented testimony in petitioner's defense, pursuant to questions asked by the defense attorney, shows that counsel had prepared the case and had communicated with his client prior to trial. Moreover, there is no indication that dissatisfaction with counsel resulted in an unjust verdict. Consequently, Brown v. Craven is clearly distinguishable.

The court is also not convinced that the state trial court inadequately inquired into the factual basis of petitioner's dissatisfaction with counsel. Pursuant to petitioner's repeated requests for the opportunity to secure private counsel and his general claims of dissatisfaction with appointed counsel, the state court amended its order appointing counsel to make counsel's assistance available at petitioner's request. A different

judge, acting as the committing magistrate, also reviewed and rejected petitioner's claimed dissatisfaction with counsel; he, in fact, continued petitioner's preliminary hearing for one week to give him an opportunity to retain counsel.[3] By the time of the rescheduled hearing it was apparent that petitioner had not yet secured private counsel but continued to believe that the trial court must appoint an attorney with which he was satisfied. (Preliminary Hearing Tr. p. 3). Petitioner also claimed that "[t]here is no way I can get the assistance of [appointed counsel]. I believe that he's working with

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[3] Apparently the arraignment and this initial preliminary hearing were not transcribed. The record references these hearings, however, in the trial transcript, at page 3, the amended order regarding court-appointed counsel, and in the transcript of the rescheduled preliminary hearing at pages 2, 3, and 4.

. . . the State's Attorney here to try to get a conviction. . . ." (Preliminary Hearing Tr. P. 4) Petitioner did not, however, cite any specific factual support for these claims, nor does he now assert the belief that counsel was working with the State's Attorney. The committing magistrate factually rejected both contentions on the basis of the record and from his discussion with petitioner at the prior hearing (Preliminary Hearing Tr. p. 4). Petitioner does not allege that the magistrate's review of these claims was inadequate and this court will not so hold.

Assuming arguendo that the trial court should have inquired more thoroughly into the factual basis, if any, for petitioner's allegation, the error was harmless since the record as a whole reflects that petitioner's claim is unsubstantial and that he received

adequate representation at trial. United States v. Young, 482 F.2d 993 (5th Cir. 1973).

DENIAL OF A CONTINUANCE

Petitioner's claim that the trial court deprived him of effective assistance of counsel and a fair trial by refusing to postpone his trial or grant a continuance is also unsupported by the record.

In the afternoon of December 27, 1976, petitioner requested his court-appointed counsel to represent him at the trial scheduled to commence on December 29, 1976. Early December 28, counsel telephoned the trial judge to request that the trial be postponed. Also, immediately preceding the trial and immediately after both sides had rested, counsel made a motion for dismissal based on the trial court's refusal to grant petitioner's request for a continuance. (Trial Tr.

pp. 2, 3 and 110). These motions were all denied.

When a denial of a continuance forms a basis of a habeas petition, the trial court must not only have clearly abused its discretion but it must have been so arbitrary and fundamentally unfair that it violated the constitutional principles of due process.[4] Because there is no mechanical test for deciding when an action is arbitrary, review hinges on the facts and circumstances present in each case, particularly the reasons for a continuance presented to the trial judge at

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[4] In Parker v. Solem, 450 F.Supp. 1150 (D.S.D. 1970) one district court has taken the view that refusing to grant a continuance does not present a cognizable issue for habeas corpus review, citing Houser v. United States, 508 F.2d 509, 515 (8th Cir. 1974). Because Houser dealt with section 2255 and does not clearly reach the issues presented here, the court will decide the issue on its merits.

the time the request is denied. See Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981), citing Ungar v. Sarafite, 376 U.S. 575, 589 (1964). Where the accused claims that denial of a continuance prohibited adequate preparation of counsel, it is also proper to examine counsel's performance during trial. United States v. Gaither, 527 F.2d 456 (4th Cir. 1975).

In the instant case, the factual basis underlying both the crime charged and the available defenses was relatively simple. Although petitioner did not fully accept counsel's representation until two days before trial, counsel was familiar with the case prior to that time since he had represented petitioner in prior post-conviction proceedings concerning the same incident, had consulted with petitioner a number of times after being formally appointed on December 3,

and had attended the December 13 preliminary hearing in an advisory capacity.

Counsel also exhibited reasonable familiarity with the facts of the case during the trial. He adequately raised petitioner's available defenses and was able to secure the testimony of several witnesses, including one expert witness, to support those defenses. He adequately conducted both direct examination and cross examination.

Significantly, neither counsel nor petitioner informed the trial court, on the record, of the specific trial preparation yet to be accomplished or the nature of any evidence or testimony yet to be secured. Compare Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981). Absent such a record, the court declines to speculate on the relationship of a continuance to the alleged deficiencies raised by petitioner.

Finally, it is evident that if counsel were unprepared, petitioner contributed to that lack of preparation. United States v. Davis, 604 F.2d 470, 481 (7th Cir. 1979); United States v. Gaither, 527 F.2d 456, 458 (4th Cir. 1975). Petitioner himself had adequate notice of trial, of his options concerning counsel, and of his need to prepare a defense.

Thus, the court holds that petitioner was not prejudiced by the trial court's refusal to grant a continuance. United States v. Gaither, supra. The cases cited by petitioner's brief are distinguishable on their facts.

JURY INSTRUCTIONS

Petitioner first claims that the trial court deprived him of due process of law by giving jury instructions numbers 11 and 12. These instructions read, in pertinent part, as follows:

JURY INSTRUCTIONS #11

In crimes such as these of which the defendant is charged in the information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

INSTRUCTION #12

An intent to do an act is a purpose or determination formed in the mind to do the act. Intent is a state of condition of the mind. The intent with which an act was done is to be determined from any direct evidence such as the statement of purpose or intent of the person doing the act as well as from all the evidence, facts and circumstances shown relating to the act charged. In such connection you are entitled to consider in light of general human experience the natural, probable and usual consequences of the acts and conduct shown and any facts and circumstances shown explaining such acts and conduct or tending to show with what purpose or intent or want thereof the perpetrator thereof acted.

* * *

(Emphasis added)

Respondent contends that petitioner's failure to object to these instructions bars habeas corpus review under the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977).

Generally, improper jury instructions do not form a basis for habeas corpus relief. Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981). When such a challenge is raised, petitioner has the burden of establishing that the instruction is not merely erroneous or even "universally condemned," but that, when viewed in the context of the overall change, it so infected the entire trial that the resulting conviction violates due process. Dietz v. Solem, supra, (8th Cir. 1981), citing Henderson v. Kibbe, 431 U.S. 145 (1977) and Cupp v. Naughten, 414 U.S. 141 (1973).

Petitioner argues that, instruction 11 effectually removed the element of specific intent from the burglary charge, making the crime one of malum prohibitum. Although the inclusion of this general intent instruction was not appropriate, the instruction cannot be viewed in isolation when reviewing the constitutional claim. Cupp v. Naughten, supra. In this case, instructions numbers 2, 3, 5, 7, 8 and 9 instructed that a finding of specific intent was necessary for a conviction. In addition, instruction 13, which correctly explained petitioner's defense to the jury, clearly reinforced the legal principle that specific intent to commit larceny was an essential element of the offense with which he was charged. Consequently, petitioner was not prejudiced.

Petitioner's contention that instruction number 12 impermissibly shifted the burden of

proof on the specific intent element from the state to him has been rejected in Bonnett v. Solem, 640 F.2d 125 (8th Cir. 1981). In Bonnett the court interpreted an instruction virtually identical to number 12 and held that it did not create a presumption that a person intends the ordinary consequences of his voluntary acts--a presumption held unconstitutional in Sandstrom v. Montana, 442 U.S. 570 (1979). Like the Bonnett instruction, instruction 12 is merely couched in terms of a permissive inference that the jury might draw from the petitioner's actions. As such, it does not shift the burden of proving intent or otherwise violate due process. Bonnett v. Solem, supra.

As to both instructions, the court further finds overwhelming evidence from which the jurors could determine the existence of specific intent to commit larceny.

Consequently, if giving either instruction 11 or 12 amounted to error, the error would be harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967).

Although the court's finding that petitioner was not prejudiced by either instruction may obviate the need to address respondent's procedural claim, the court also finds that petitioner has shown no cause for his failure to make timely objections to the challenged instructions.[5] Therefore, review would be barred under either prong of the cause and prejudice test promulgated in Wainwright v. Sykes, 433 U.S. 72 (1977). See Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981).

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[5] South Dakota has a statutorily enacted contemporaneous objection rule, S.D.C.L. 23-42-6(5) repealed July 1, 1979. Present law is identical, S.D.C.L. 23A-24-2(5) effective July 1, 1979).

As further ground for relief, petitioner contends that he was entitled to have the jury instructed on the lesser included offenses of grand larceny and petty larceny.[6]

First, larceny is not a lesser included offense of burglary in this state. See, State v. Moeller, 298 N.W.2d 93, 94 (S.D. 1980). More importantly, the Eighth Circuit Court of Appeals has held that "the trial court's failure to give a lesser included offense instruction is not normally such a constitutional error or 'fundamental defect' as to allow collateral review under habeas corpus." Cooper v. Campbell, 597 F.2d 628 (8th Cir. 1979); DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975). This case presents no exception. Given the evidence in this case, denial of petitioner's proposed instructions

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[6] The trial court instructed on first, third and fourth degree burglary.

did not inherently result in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure. Cooper v. Campbell, supra; DeBerry v. Wolff, supra.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's separate claim of ineffective assistance of counsel is also without merit. In the Eighth Circuit, the burden of proving ineffective assistance of counsel is a heavy one and involves a two-step process:

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." There is a presumption that counsel has rendered effective assistance. To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense.

DuPree v. United States, 606 F.2d 829, 830-31 (8th Cir. 1979) (per curiam), cert. denied, 445 U.S. 919 (1980). (citations omitted)

Petitioner has not overcome this presumption. Most of the claimed deficiencies of counsel have been specifically disposed of in the above sections. Briefly, the court finds that counsel adequately prepared for trial and adequately conducted petitioner's defense. If there was inadequate assistance in any particular respect before trial, the court finds that either it did not prejudice petitioner or it was occasioned by petitioner's choice to ignore counsel until shortly before trial. See United States v. Johnson, 585 F.2d 374 (8th Cir. 1978). The record discloses that the trial court appointed a capable attorney who was prepared to and did counsel petitioner before trial.

Although he repeatedly raises the fact that counsel did not interview his wife, who accompanied him on the night of the incident, petitioner has not shown that this was a breach of an essential duty or that it materially prejudiced his defense of intoxication. Counsel did secure the testimony of the Director of the Sioux City American Indian Center and also an expert witness, a psychologist and alcoholic counsellor, who interviewed petitioner and supported his defense of a blackout during the incident; in addition, petitioner himself testified that he had been drinking the night of the incident; moreover, he was the only one who could personally testify as to the nature of his alleged blackout. The court will not second guess counsel when petitioner has failed to show how the witness' testimony would have made any material addition to petitioner's defense.

Finally, in an argument raised for the first time in his application for habeas corpus relief, petitioner asserts that counsel failed to suppress an alleged confession made by petitioner to a probation officer, which formed a part of the state's rebuttal evidence. Petitioner's conversations with the probation officer were permissibly admitted at trial, however, as prior inconsistent statements impeaching the credibility of the defendant's trial testimony. See State v. Lana, 264 N.W.2d 465, 489 (S.D. 1978). Moreover, petitioner has again failed to demonstrate any factual basis suggesting that a suppression motion might have succeeded or that a reasonably competent attorney would have attempted suppression given the evidence in the case as a whole. See Long v. Brewer, No. 81-1530, slip op. at 5-6, (8th Cir. filed January 8, 1982).

Any issues not specifically addressed herein have been reviewed and are found to be either groundless or rendered moot by this decision.

Petitioner's application is without merit, and is hereby denied.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52. Judgment shall be entered accordingly.

Dated this 24th day of February, 1982.

/s/ John B. Jones
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

* *

RICHARD ALLEN NERISON, Petitioner, -vs- HERMAN SOLEM, Warden, South Dakota State Penitentiary and MARK MEIERHENRY, Attorney General, State of South Dakota, Respondents.	* * * \

Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED:

That the petition of Richard Allen Nerison for a Writ of Habeas Corpus be and the same hereby is denied on its merits.

Dated this 25th day of February, 1982.

BY THE COURT:

/s/ John B. Jones
United States District Judge

ATTEST:

/s/ William F. Clayton
WILLIAM G. CLAYTON, Clerk

BY /s/ DeAnn Noteboom
Deputy

(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

* *

RICHARD ALLEN NERISON, Plaintiff, -vs- HERMAN SOLEM, Warden, South Dakota State Penitentiary and MARK MEIERHENRY, Attorney General, State of South Dakota, Defendants.	* * * * * * * * * * * * * * * * * * *	CIV 80-4132 ORDER NUNC PRO TUNC

* *

It appearing to the Court that the petitioner, Richard Allen Nerison, had sent a letter to Judge Nichol after receiving an Order denying his petition for habeas corpus, and that said letter constituted a request for counsel and for the right to appeal, it is hereby

ORDERED that the Court finds that there is probable cause for said appeal, and that said notice of appeal be filed with the Clerk of this Court, and

IT IS FURTHER ORDERED that Michael H. Dow be appointed as counsel for the Petitioner, Richard Allen Nerison.

Dated at Sioux Falls, South Dakota, this 16th day of April, 1982, nunc pro tunc March 18, 1982.

BY THE COURT:

/s/ John B. Jones
United States District Judge

ATTEST:

/s/ William F. Clayton
WILLIAM F. CLAYTON, Clerk

By /s/ DeAnn Noteboom
Deputy

(SEAL)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: ss
COUNTY OF UNION) FIRST JUDICIAL CIRCUIT

RICHARD ALLEN NERISON,
PETITIONER,

vs.

STATE OF SOUTH DAKOTA,
RESPONDENT.

MEMORANDUM OPINION

APPEARANCES:

Mr. Thomas M. Frankman, Esq., of Willy, Pruitt, Matthews, Hurd, Farrell, Frankman and Johnson, Attorneys at Law 801 National Bank of South Dakota Building Sioux Falls, South Dakota 57102

Attorney for Petitioner;

Mr. Denis R. Eckert, Esq., Elk Point, South Dakota, State's Attorney in and for Union County, Elk Point, South Dakota.

.....

On December 30, 1976, Petitioner was convicted of First Degree Burglary by a jury at Elk Point, Union County, South Dakota. Petitioner has petitioned for post conviction relief and has raised a number of contentions.

Petitioner contends that the Court erred in not appointing him a different attorney; in not granting his application for a change of judge; and in not granting his motion for a continuance of the trial.

Upon careful review of the record this Court finds no merit in the above contentions. The trial Court appointed Mr. James Krueger, a competent attorney to represent Mr. Nerison on Dec. 3, 1976. Mr. Nerison, through his own obstinacy refused to believe he was not entitled to an attorney of his own choosing at the expense of Union County. He also apparently believed that he could in

some manner secure his own attorney. Because of these mistaken beliefs he did not cooperate with his attorney until right before trial. Petitioner's own negligence caused the affidavit for change of judge to be filed late and created a short preparation time for Mr. Krueger.

Mr. Krueger, however, knew the facts of the case for some time, as he attended the preliminary hearing on Dec. 13, 1976, and the record shows that he adequately defended Mr. Nerison at the trial. While Mr. Nerison was entitled to adequate assistance of counsel he is not entitled to counsel of his own choosing. Judge Erickson's participation in Mr. Nerison's previous plea to this charge does render him prejudiced against Mr. Nerison since this was a trial to the jury and justice does not require that the requirements

of SDCL 15-12-27 (2) (b) be overlooked. Furthermore the record shows absolutely no bias on the part of Judge Erickson. This case was easily preparable due to the simplicity of the facts involved and Judge Erickson did not err in denying the motion for continuance.

Petitioner further contends that his motion to dismiss on the grounds that the State failed to show specific intent to commit larceny should have been granted. There is no merit to this contention since the record clearly shows testimony establishing specific intent beyond a reasonable doubt, if said testimony was believed by the jury.

Lastly, petitioner contends, that the Court committed prejudicial error in giving instructions number 11 and 12 as follows:

Instruction # 11

"In crimes such as these of which the defendant is charged in the information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful."

Instruction # 12

"An intent to do an act is a purpose or determination formed in the mind to do the act. Intent is a state of condition of the mind. The intent with which an act was done is to be determined from any direct evidence such as the statement of purpose or intent of the person doing the act as well as from all the evidence, facts and circumstances shown relating to the act charged. In such connection you are entitled to consider in light of general human experience the natural, probable and usual consequences of the acts and conduct shown and any facts and circumstances shown any any [sic] facts and circumstances shown explaining such acts and conduct or

> tending to show with what purpose or intent or want thereof the perpetrator thereof acted.
>
> Since the human mind functions with great rapidity such an intent can be formed instantly before committing the act by which it is carried into execution and to establish such intent it is not necessary that it be shown that the intent had been formed and existed for any considerable time before the act but it is sufficient if it be shown that the intent had been formed and existed at the time the act was committed.

Burglary in the First Degree is a specific intent crime. Instruction # 11 is a general intent instruction. Petitioner contends that the inclusion of this instruction removed the element of specific intent by making the crime one of malum prohibitum. He further contends that instruction # 12 allows the jury to infer specific intent from the petitioner's doing of a particular act thus shifting the burden of proof to the petitioner to rebut the inference.

The inclusion of Instruction #11 in this case was not appropriate. Instruction #12 however was appropriate. The question is did the inclusion of Instruction #11 deprive the petitioner of a fair trial? This Court holds that it did not, and the inclusion of said instruction would not constitute prejudicial error in this particular case.

The instructions in this case must be read as a whole to determine whether or not the jury was misled as claimed by the petitioner.

Correct and adequate instructions were given to inform the jury that the burden of proof was upon the State to prove all the elements of burglary beyond a reasonable doubt as evidenced by instructions 2, 3, 5, 7, 9, 16 and 17. In addition thereto instruction 13 was given as follows:

> "There is no evidence in this case tending to show that the defendant may have been intoxicated prior to

and at the time of the alleged commission of the offense with which he is charged.

Under our law no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the existence of any particular purpose, motive or intent is a necessary element to constitute the crime charged, the jury may take into consideration the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which he commited [sic] the act, if he did commit it.

An essential element of the offense with which the defendant is charged is that he had the specific intent to commit some crime, namely larceny. Even though the defendant may have been intoxicated to some degree, if you find that the State has proved beyond a reasonable doubt that the defendant was capable of forming the specific intent to commit some crime, namely larceny, and had such specific intent and that the State has proved beyoind [sic] a reasonable doubt all other essential elements of the offense charged, you may find the defendant guilty.

> But if you find that the State has failed to prove beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant was capable of forming the specific intent to commit some crime, namely larceny, and so faild [sic] to find that he had such specific intent, you must find the defendant not guilty."

This instruction clears up any ambiguities that could have been created by instruction #11. The charge to the jury must "be viewed as a whole to determine whether it conveyed to the jury a clear and correct understanding of the law." MAUK v. JOHNSON, MINN., 219 NW2d 631, 636 (1974). (see also DWYER v. CHRISTENSEN, 92 NW2d 199 (1958). "The test in passing on the prejudical effect of an erroneous instruction is the probability, not the possibility that the jury was misled thereby." FLEURY v. WENTORF, WISC., 262 NW2d 68, 72 (1978).

The defense in this case was intoxication to the extent that a specific intent to

commit larceny could not have been formed. Petitioner testified to this effect. An expert witness testified to the existance [sic] of "blackouts" and to the probability that the petitioner had one at the time of the incident. Petitioner was caught in the act of committing the burglary. The victim and the arresting officers testimony were not consistent with a substantial degree of intoxication on the part of the petitioner nor were his general actions after he left the scene of the crime. Furthermore petitioner later made statements to a state parole officer that were inconsistent to his defense of "blackout".

An instruction on presumed criminal intent was found not to be prejudicial "where a different result would not have been arrived at by the jury had an instruction on general intent not been given." PEOPLE v. WALDRON, 7 CAL. REP. 916 (1960). In LUTZ v.

SHELBY MUT. INS. CO., WISC., 235 NW2d 426 (1975) the Court held"...an error relating to the giving or refusing to give an instruction is not prejudicial if it appears that the result would not be different had the error not occurred."

The evidence of guilt in this case is overwhelming. It can be said beyond a reasonable doubt that there was no prejudicial error in this proceeding.

The petition for post conviction relief is denied. Counsel for respondent shall prepare findings of fact and a judgment consistent herewith.

Respectfully submitted,

/s/ Paul J. Kern
Circuit Judge

January 31, 1983

Mr. Michael H. Dow
Swanson, Carter & Dow
100 South Dakota Avenue
Sioux Falls, SD 57102

Mr. Richard Allen Nerison
Reg. No. 34050
P.O. Box 2500
Lincoln, NE 68508

Hon. Mark Meierhenry
Attorney General
Attn: Mr. Grant Gormley
Assistant Attorney General
State Capitol
Pierre, SD 57501

Re: No. 82-1483 Richard Allen Nerison v. Herman Solem, Warden, etc., et al

Gentlemen:

Enclosed please find copy of an order entered by us today in the above-entitled appeal. This order was entered at the direction of the court.

Sincerely,

Linda L. Penberthy
Chief Deputy Clerk

caf

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1483		September Term, 1982
Richard Allen Nerison, Appellant, v. Herman Solem, Warden, South Dakota State Penitentiary and Mark Meierhenry, Attorney General, State of South Dakota, Appellees.	*	Appeal from the United States District Court for the District of South Dakota

On the court's own motion, it is ordered that the parties file supplemental briefs covering only the subject of "enhanced sentence." The briefs should be limited to twenty (20) pages and be filed within ten (10) days of the date of this order.

January 31, 1983.